Supreme Court, U.S.
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No. 91-1321

In The

Supreme Court of the United States

October Term, 1991

BRANDON STEEL DECKS, INC.,

Petitioner,

v.

WANDA P. HINES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit "ignored" this Court's decision in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), when it directed the trial court to consider trustworthiness, relevance, cumulativeness, and prejudicial effect when analyzing the admissibility of hearsay evidence under Federal Rule of Evidence 803(8)(C)?

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STATEMENT OF THE CASE

Respondent wishes to point out one important error in Petitioner's Statement of the Case: the Eleventh Circuit did not expand this Court's *Rainey* test by adding new elements to it; the Eleventh Circuit simply discussed settled points of evidentiary analysis as expressed in this Court's *Rainey* decision and the Federal Rules of Evidence. This misstatement on the part of Petitioner, upon which its entire argument is apparently based, will be more fully addressed below.

Prior to this Court's ruling in *Beech Aircraft v. Rainey*,[1] the United States Court of Appeals for the Eleventh Circuit, in applying Rule 803(8)(C)[2] of the Federal Rules of Evidence, permitted a distinction to be made between facts and opinions; findings of facts were admissible under the hearsay exception, but statements in the forms of opinions or conclusions were not.[3] Accordingly, the United States District Court for the Middle District of Georgia excluded portions of an OSHA report in the instant case on the basis that they consisted of opinions and were not factual findings.

This Court subsequently reversed the Eleventh Circuit's ruling in *Rainey*, and held that the facts versus opinions distinction was not a valid one under Rule

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[1] 109 S.Ct. 439, 448 U.S. 153, 102 L.Ed.2d 445 (1988).

[2] Rule 803(8)(C) deals with the admissibility into evidence of hearsay in the form of government records and reports.

[3] *Rainey v. Beech Aircraft Corporation*, 827 F.2d 1498 (11th Cir. 1987) (en banc), aff'd in part, rev'd in part, 109 S.Ct. 439, 488 U.S. 153, 109 L.Ed.2d 445 (1988).

803(8)(C), and that the proper factors to address when determining the admissibility of evidence were the offered evidence's trustworthiness (Rule 803), its relevance (Rule 401), and the likelihood of prejudice as compared to its probative value (Rule 403).[4]

Brandon Steel Decks appealed the District Court's ruling to exclude the evidence on the basis of the fact/opinion distinction, and the Eleventh Circuit, pursuant to this Court's *Rainey* decision, remanded the case to the district court with instruction to reconsider the admissibility of the previously excluded portions of the OSHA report.[5] In so doing, the Eleventh Circuit pointed out that the district court was not to make its determination based on a distinction between facts and opinions, but was to make it based only on those considerations set out in the Federal Rules of Evidence and other accepted factors as expressed by this Court in *Rainey*.

The district court, exercising its statutory discretion, found the evidence to be inadmissible based on valid considerations without implementing the now-invalid "facts" versus "opinions" distinction,[6] and Brandon Steel Decks appealed the district court's order, claiming the trial court abused its discretion. The Eleventh Circuit

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[4] *Rainey*, 109 S.Ct. at 449.

[5] *Hines v. Brandon Steel Decks, Inc.*, 886 F.2d 299 (11th Cir. 1989).

[6] 16 January 1990 Order of the United States District Court for the Middle District of Georgia, Albany/Americus Division (*See* Appendix B of Petition).

affirmed the district court's order with no written opinion, finding that the trial court did not abuse its discretion.

Brandon Steel Decks now comes to this Court with a nearly identical argument with which it failed before the Eleventh Circuit, which is: *Beech Aircraft v. Rainey* acts to prohibit courts from exercising discretion in considering the admissibility of government reports, even where the trial court, in its discretion, finds that sufficient negative factors are present to call for the invocation of various exclusion provisions of the Federal Rules of Evidence.

Your Respondent respectfully submits that any reading of this Court's decision in *Rainey*, the Eleventh Circuit's decision in *Hines*, and the district court's ruling on remand reveals no inconsistencies whatsoever.

REASONS FOR DENIAL OF PETITION FOR WRIT OF CERTIORARI

THIS COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS BECAUSE THE ELEVENTH CIRCUIT'S DECISION FROM WHICH THIS APPEAL IS SOUGHT IS IN ACCORDANCE WITH ALL APPLICABLE LAW, INCLUDING THIS COURT'S OPINION IN *BEECH AIRCRAFT V. RAINEY*

Petitioner bases its argument on the assertion that the "Eleventh Circuit is ignoring this Court's decision in *Beech Aircraft v. Rainey*."[7] Petitioner goes on to argue that

[7] Petition of Brandon Steel Decks, Inc., for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, p. 11.

the Eleventh Circuit grafted "additional factors" onto this Court's opinion in *Rainey*.[8] As can be clearly seen from a reading of this Court's opinion in *Rainey* and the Eleventh Circuit's opinion in *Hines*, this claim made by Petitioner is a bold misstatement, and the petition is frivolous and is being made solely for the purpose of delay.

Respondent respectfully submits that the applicability of this Court's opinion in *Rainey* to the case *sub judice* is limited to the elimination of the distinction that the Eleventh Circuit had been making between "facts" and "opinions" when applying Federal Rule of Evidence 803(8)(C). This Court pointed out that such a distinction was not called for in determining the admissibility of public records and reports or any portions thereof. This Court went on to hold, however, that other considerations are not only called for, but **must** be addressed in determining admissibility, relying on accepted modes of evidentiary analysis as well as on the Federal Rules of Evidence and the Advisory Committee's comments thereon.

Among those considerations pointed out by this Court in *Rainey* were the report's trustworthiness,[9] its relevance,[10] and its prejudicial effect as compared to its probative value.[11] This Court also emphasized that it was

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[8] *Id.*, at 12.

[9] 109 S.Ct. at 442, 445, 447, 448, 449, 450.

[10] *Id.*, at 449.

[11] *Id.*, at 449.

not addressing any distinction between conclusions of fact and conclusions of law.[12] This Court stated as follows in *Rainey*:

> **Thus, a trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof – whether narrow "factual" statements or broader "conclusions" – that she determines to be untrustworthy.** [citation omitted]. **Moreover, safeguards built in to other portions of the Federal Rules, such as those dealing with relevance and prejudice, provide the court with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them.**[13]

In examining the issue of trustworthiness, this Court cited the Advisory Committee's "nonexclusive list of four factors it thought would be helpful in passing on [the question of trustworthiness]," which includes the investigator's skill or experience and whether a hearing was held.[14]

With this Court's *Rainey* decision in mind, it is difficult if not impossible to read the Eleventh Circuit's *Hines* opinion and find "new" factors to be considered in determining the admissibility of evidence. The Eleventh Circuit in *Hines* held that:

> **Rule 803(8)(C) allows into evidence public reports that (1) set forth factual findings (2)**

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[12] *Id.*, at 450, n. 13.

[13] *Id.*, at 448-49.

[14] *Id.*, at 449, n. 11, citing Advisory Committee's Notes on Fed.Rule Evid. 803(8), 28 U.S.C. App., p. 725.

> **made pursuant to authority granted by law (3) that the judge finds trustworthy.** [citation omitted]. **In addition, pubiic reports, otherwise admissible under Rule 803(8)(C), may nonetheless be excluded in whole or in part if the trial court finds that they are either irrelevant or more prejudicial than probative.** *See Rainey*, 109 S.Ct. at 448-49; *United States v. MacDonald*, 688 F.2d 224, 230 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983). **The district court has broad discretion to admit or exclude evidence during trial and the decision to exclude evidence will not be reversed absent a clear showing of abuse of that discretion.** [citation omitted].[15]

The Eleventh Circuit *Hines* opinion goes on to discuss these considerations, adding nothing new to what this Court already stated in *Rainey*. In its discussion, the Eleventh Circuit relied heavily on accepted precedent from other circuits[16] and *The Trustworthiness of Government Evaluation Reports under Federal Rule of Evidence 803(8)(C)*[17], a note cited by this Court in *Rainey*.[18]

The Eleventh Circuit, in light of *Rainey*, remanded the case *sub judice* to the district court with instruction that it make its determination of admissibility not on the distinction between facts and opinions, but only on those considerations expressly mentioned in this Court's *Rainey* opinion and the Federal Rules of Evidence. This Court's

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[15] *Hines, supra* at 302.

[16] *Id.*, at 303.

[17] 96 Harv.L.Rev. 492 (1982).

[18] *Rainey*, at 449, n. 11.

decision in *Rainey* neither required nor suggested anything more. Nothing was "grafted," and this Court's opinion was clearly not "ignored." On the contrary, it was cited as the primary source of guidance in both the Eleventh Circuit's opinion[19] and the district court's subsequent order.[20]

Petitioner's assertion that the Eleventh Circuit Court of Appeals spent only two brief paragraphs of its five page opinion discussing *Rainey* as it applies to the OSHA report in this case is misleading. The entire opinion is a discussion of points addressed by this court in *Rainey*. The statement that the Eleventh Circuit's opinion centered around "additional factors and tests" is simply not true. Petitioner's claim that the Eleventh Circuit grafted additional factors onto this Court's opinion in *Rainey* is unsubstantiated in both its brief and the actual texts of the *Rainey* opinion and the Eleventh Circuit *Hines* opinion. Petitioner apparently attempts to make the argument that the Eleventh Circuit's discussion of the concerns of trustworthiness, cumulative evidence, irrelevance, and prejudice versus probative value are "additional factors." Even assuming that these were not discussed by this Court in *Rainey* (which of course they were) as being legitimate and necessary considerations, Petitioner appears to take the position that the *Rainey* opinion calls for an application of Rule 803(8)(C) that disregards the last clause of that rule itself as well as the remainder of the Federal Rules of Evidence.

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[19] *Hines*, at 302.

[20] Appendix to Petition, 21.

Of additional concern is the Petitioner's reference to certain items on page 13 of its brief of which it somehow knows the Eleventh Circuit took no notice: Petitioner claims that "(1) trustworthiness had never been an issue in the case until it was raised by the trial court on remand." There was no need for it to be an issue under the Eleventh Circuit's *Rainey* opinion, and in fact, it was not first raised by the trial court on remand, it was raised **by this Respondent to the trial court.** "(2) the Rule 403 analysis was first raised by the Eleventh Circuit on appeal." Once again, there was no need to raise it until this Court issued its *Rainey* opinion, which itself called for that Rule's application. "(3) the OSHA report could not be more relevant within the meaning of Rule 401, since the jury was being asked to find the same facts which had been found by the OSHA investigation; and (4) Hines never made a Rule 403 objection to the OSHA Report, so there was no evidence of 'prejudice' in the record upon which to base a Rule 403 exclusion." Respondent had no need to raise these objections as long as the Eleventh Circuit *Rainey* opinion was in effect, but once it became necessary, these objections were made, and they were addressed by both parties at the trial court and in the Eleventh Circuit.

It has already been raised and argued by both parties that the jury heard not only the same evidence as was available to the OSHA investigator, but heard additional evidence that the OSHA investigator did not have when making his conclusions. Additionally, the jury had the benefit of the trial judge's instructions on legal issues, to which no objection is being made. The question, then, is not merely the prejudicial nature of the evidence, but

whether its prejudicial effect to the jury far outweighs its probative value. Petitioner has conceded that the report's findings are prejudicial, but does not argue that the report has any probative value beyond that evidence that was presented to the jury.

CONCLUSION

Brandon Steel Decks argues that the Eleventh Circuit has ignored this Court's decision in *Rainey* and has created an entirely new test to be applied to reports such as that offered in the instant case. In *Hines*, the Eleventh Circuit held that government reports and portions thereof are not subject to exclusion based on a "fact" versus "opinion" test, but are subject to Rule 401's relevance requirement, Rule 403's cumulative and prejudice tests, and Rule 803's trustworthiness consideration. This Court's ruling in *Rainey* held that "[s]tatements in the form of opinions or conclusions are not on that account excluded from the scope of Rule 803(8)(C),"[21] but must be excluded if the trial court determines they are untrustworthy and are subject to scrutiny pursuant to other safeguards in the Federal Rules of evidence, such as those dealing with relevance and prejudice.[22] To assert, as Petitioner does, that the former is the product of the Eleventh Circuit's ignoring the latter is clearly absurd. For every factor discussed by the Eleventh Circuit, there is an express reference in both this Court's *Rainey* opinion and the Federal Rules of Evidence.

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[21] *Rainey, supra*, at 441.

[22] *Id.*, at 449.

Respondent is being compelled to answer misstatements made by Petitioner. By way of these misstatements, Petitioner is enjoying yet another delay in its obligation to Respondent. There can be no basis for this petition but the frivolous purpose of delay. Respondent therefore respectfully requests that this Court consider the application of Rule 42.2 of the Rules of the Supreme Court of the United States.

In conclusion, Respondent respectfully submits that the Eleventh Circuit's decision in *Hines* is entirely consistent with *Rainey*. There is accordingly no reason for this Court to grant review.

This 10 day of March, 1992.

/s/ S.W. Oates, Jr.
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Attorney for Respondent